

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2019 JAN 11 AM 9:17

CLERK

BY JAN
DEPUTY CLERK

CHOOSECO LLC,)
Plaintiff,)
v.)
NETFLIX, INC.,)
Defendant.)

Civil Action No. 2:19-cv-8

COMPLAINT

Plaintiff Chooseco LLC (“Chooseco”), by and through its attorneys, Dinse P.C., complains against Netflix, Inc. (“Netflix”) as follows:

Introduction

This is an action for trademark infringement, unfair competition, false designation of origin, and dilution arising under the Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq.*, as amended (the “Lanham Act”) and for unfair competition under the common law of the State of Vermont.

1. Chooseco has several federally registered trademarks that include the word mark CHOOSE YOUR OWN ADVENTURE. Netflix has no license or authorization to use any Chooseco trademark.

2. Chooseco’s popular and beloved CHOOSE YOUR OWN ADVENTURE brand began with a series of interactive books for young adults in which the reader acts as the story’s protagonist and makes choices that affect the narrative’s plot and outcome. The brand has expanded over the years to include related products and services, but Chooseco continues to print and sell thousands of CHOOSE YOUR OWN ADVENTURE books each year. Part of Chooseco’s marketing strategy includes appealing to adults now in their twenties, thirties, and

forties who remember the brand with pleasant nostalgia from their youth and then buy CHOOSE YOUR OWN ADVENTURE books for their own children.

3. On December 28, 2018, Netflix released a much-hyped, and—upon information and belief—widely viewed interactive film called *Black Mirror: Bandersnatch* on its digital streaming platform.¹ In the first few minutes of the movie, the protagonist refers to a fictional book in the diegesis as a “Choose Your Own Adventure” book. Netflix has no license or authorization to use Chooseco’s trademark and, upon information and belief, used the mark willfully and intentionally to capitalize on viewers’ nostalgia for the original book series from the 1980s and 1990s. The film’s dark and, at times, disturbing content dilutes the goodwill for and positive associations with Chooseco’s mark and tarnishes its products.

4. Netflix is infringing Chooseco’s valuable trademark. It is causing confusion, tarnishing, denigrating, and diluting the distinct quality of the CHOOSE YOUR OWN ADVENTURE mark.

5. Chooseco seeks damages and injunctive relief in this action.

Parties

6. Plaintiff Chooseco LLC is a Vermont limited liability company with a principal place of business in Waitsfield, Vermont.

7. Defendant Netflix, Inc. is a publically traded Delaware corporation with a principal place of business in Los Gatos, California.

Jurisdiction and Venue

8. This Court has subject matter jurisdiction over the claims alleged pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1338(a), 1338(b) and the principles of pendant jurisdiction.

¹ This Complaint references the plot of the film to some extent and may contain spoilers.

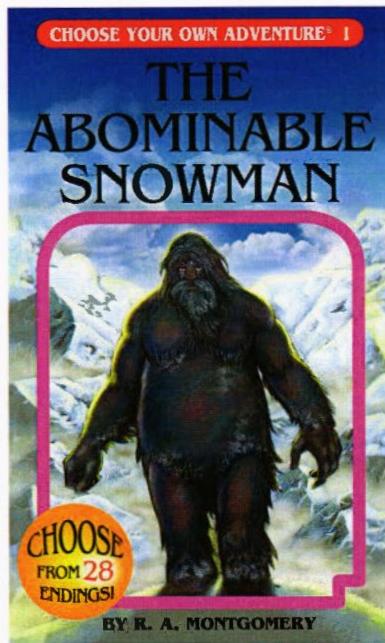
9. This Court has personal jurisdiction over Netflix because Netflix does business in this district. Specifically, Vermont residents subscribe to Netflix's streaming services and stream Netflix's content to their personal devices in this district. Netflix has offered and displayed the film *Bandersnatch: Black Mirror* throughout the district by streaming it to the personal devices of subscribers present in the district.

10. Venue is proper in this district under 28 U.S.C. § 1391.

Facts

I. Choose Your Own Adventure Books and Trademark

11. Chooseco is the current publisher of the beloved and well-known series of CHOOSE YOUR OWN ADVENTURE books. Below is a sample image of the front cover of *The Abominable Snowman* by R. A. Montgomery.



12. Each CHOOSE YOUR OWN ADVENTURE book is written in the second person. The reader acts as the story's protagonist and makes choices to determine the narrative's plot and ending. The reader is directed to a different page in the book depending on the choice

he or she has made. There are multiple potential endings at various points that a reader may land on based on the choices he or she makes.

13. The series was widely read in the 1980s and 1990s, and book sales remain strong. Chooseco and its predecessors in interest have sold in excess of 265 million copies of CHOOSE YOUR OWN ADVENTURE books. Within the last year, Chooseco has printed more than 620,000 copies for distribution throughout the United States. In the last ten years, the CHOOSE YOUR OWN ADVENTURE series has also been licensed for translation and distribution in twenty-seven other countries. The target demographic of current readers is primarily children and young adults between seven and fourteen years old with reading levels of second through eighth grade.

14. When the CHOOSE YOUR OWN ADVENTURE books were originally published, the children reading them ranged from approximately seven to fourteen years old. Based on information available to Chooseco, children who read the series during its initial publication are now in their twenties, thirties, and forties. Chooseco has effectively focused on that audience and has used the hook of nostalgia to interest adults who read the books when they were young in buying CHOOSE YOUR OWN ADVENTURE books for their children.

15. Chooseco has registered the trademark CHOOSE YOUR OWN ADVENTURE in connection with books, movies, and other types of media. *See Exhibit A, Reg. No. 2,913,403.* It has numerous other federally registered trademarks and common law rights in its marks, as well as pending applications. Chooseco has assiduously built and developed the CHOOSE YOUR OWN ADVENTURE brand using its famous trademark not only for its books, but also for other entertainment services, including movies.

16. For example, Chooseco has licensed the mark for a tabletop board game that has sold over 150,000 units since its launch in June 2018, seven months ago.

17. For further example, Twentieth Century Fox currently holds an option contract with Chooseco to develop an interactive film series based on the CHOOSE YOUR OWN ADVENTURE books. *See Exhibit B, Ricardo Lopez, 'Choose Your Own Adventure' Interactive Movie in the Works at Fox, Variety (April 26, 2018, 11:14 am).*

18. Chooseco also owns and operates a consumer website where it provides interactive games, shares information about its products and the individuals involved in their creation, and sells products directly to consumers.

19. Beginning in 2016, Netflix actively pursued a license to use CHOOSE YOUR OWN ADVENTURE in connection with films and interactive cartoons. Chooseco and Netflix engaged in extensive negotiations that were ongoing for a number of years, but Netflix did not receive a license.

20. On at least one occasion before the release of Bandersnatch, Chooseco sent a written cease and desist request to Netflix asking Netflix to stop using the CHOOSE YOUR OWN ADVENTURE mark in connection with its marketing efforts for another television program.

II. Netflix's *Black Mirror: Bandersnatch*

21. Netflix is a popular media services company that primarily offers subscription-based digital video streaming services. Its digital library includes a wide variety of movies and television programs. Upon information and belief, Netflix has hundreds of millions of subscribers worldwide who may access its streaming content through their personal devices.

22. Upon information and belief, Netflix has subscribers who purchase and view digital content on their personal devices in Vermont and also markets its services to current and potential subscribers in Vermont

23. Netflix's streaming library includes a program called *Black Mirror*, a speculative fiction anthology series that examines the relationship between humans and technology.

24. *Black Mirror: Bandersnatch* ("Bandersnatch") is an interactive film in the *Black Mirror* anthology. Netflix released Bandersnatch on its streaming platform on December 28, 2018.

25. Upon information and belief, many Netflix subscribers have viewed Bandersnatch in Vermont.

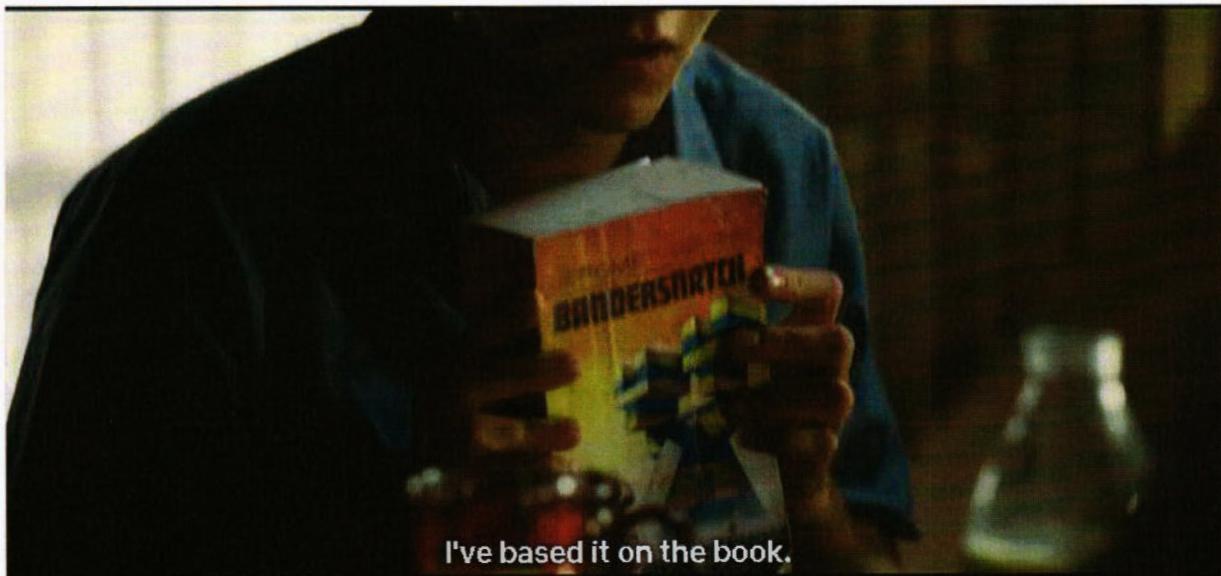
26. As in the CHOOSE YOUR OWN ADVENTURE series, Bandersnatch viewers make choices to determine the plot and ending of the film. Rather than flip from one page to another, viewers click a button at the bottom of their screen using a mouse or other controller to select their choice.

27. For example, early on in the film, the viewer is given two options to select the protagonist's breakfast cereal:

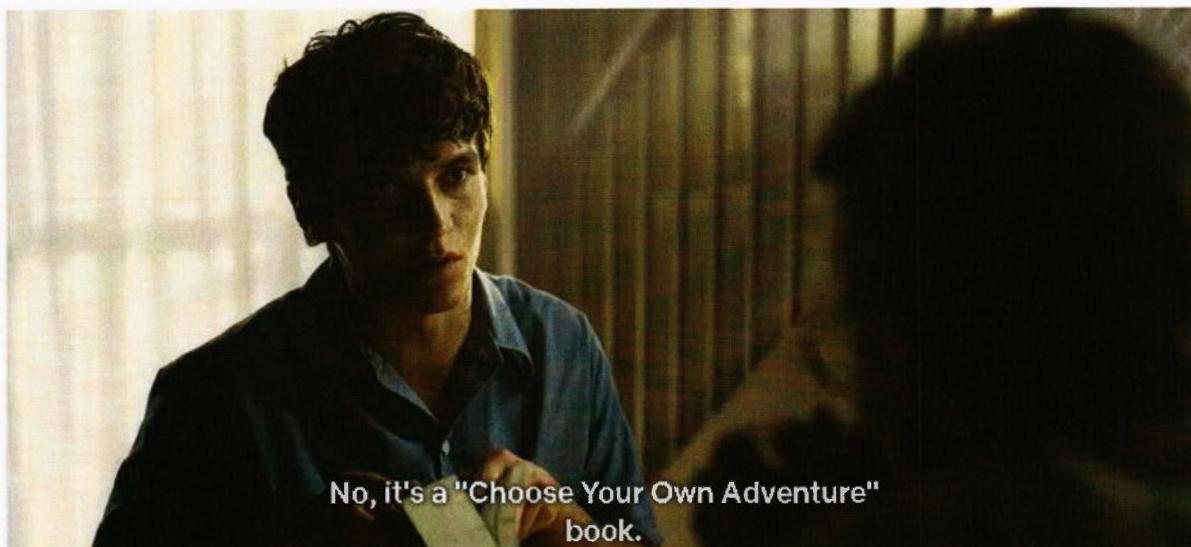


² Netflix provides viewers with the option to turn on subtitles or captions while viewing its content. The images in this Complaint are screenshots of the film with Netflix's English subtitle feature turned on.

28. The protagonist of *Bandersnatch* is a young programmer named Stefan Butler. In the first sequence of the film, viewers learn that Butler is preparing for a meeting to pitch a demo of a videogame that he has been working on. Butler tells his father that his game is based on a fictional book titled *Bandersnatch* by a fictional author named Jerome F. Davies:



29. Butler's father remarks that Davies must not be a good writer because Butler is "always flicking backwards and forwards in that." This feature—flipping back and forth—is a hallmark of a CHOOSE YOUR OWN ADVENTURE book. Butler responds next that *Bandersnatch* is a "Choose Your Own Adventure" book:



30. Next, Butler says, "You decide what your character does."



31. The version of the film that the viewer sees depends on the choices the viewer makes, but every single viewer sees the first sequence, including its reference to the so-called Choose Your Own Adventure book, *Bandersnatch*. Upon information and belief, Netflix provides its own closed-captioning and subtitle services. Its use of quotes and capital letters in the subtitles is further evidence of Netflix's knowing and willful use of Chooseco's trademark.

32. Overall, Bandersnatch is a dark film and the videogame that Butler creates in it based on its fictional inspiration is equally dark. Nearly every narrative fork includes disturbing and violent imagery. The movie has a rating of TV-MA, which means the content is specifically designed to be viewed by adults. Depending on the choices the viewer makes, it can include references to and depictions of a demonic presence, violent fighting, drug use, murder, mutilation of a corpse, decapitation, and other upsetting imagery.

33. These dark and violent themes are too mature for the target audience of Chooseco's CHOOSE YOUR OWN ADVENTURE BOOKS. Association with this grim content tarnishes Chooseco's famous trademark.

34. Chooseco has not granted Netflix a license to use its trademark.

35. Netflix has benefitted from its association with Chooseco's iconic brand.

Bandersnatch has been discussed widely in the press and many reviews of the movie include the phrase or even reference the book series.

36. The association between Bandersnatch and Choose Your Own Adventure has been widely discussed on social media. That discussion demonstrates the dilution of the brand.

37. Upon information and belief, Netflix intentionally and willfully used Chooseco's famous mark in order to benefit from the positive associations with—and nostalgia for—the brand by adults who read the series as youngsters.

38. Upon information and belief, Bandersnatch viewers have already been confused about the brand's association with the film and are likely to be confused in the future.

39. Upon information and belief, Chooseco has already suffered reputational harm due to viewers' negative associations with Bandersnatch.

40. Upon information and belief, Netflix intends to continue its course of conduct and wrongfully promote, offer for sale, and distribute a product or products using the mark CHOOSE YOUR OWN ADVENTURE, despite Chooseco's ownership of the mark.

41. As a direct and proximate result, Chooseco has suffered damages and will suffer irreparable injury. A conservative initial estimate of Chooseco's damages based on information currently available is \$25 million.

First Claim for Relief – Federal Trademark Infringement
(15 U.S.C. § 1114)

42. Chooseco restates and incorporates the allegations of Paragraphs 1 through 41 of this Complaint as if fully set forth herein.

43. Chooseco is the owner of the trademark CHOOSE YOUR OWN ADVENTURE and has federally registered that mark in connection with a variety of goods and services. The

CHOOSE YOUR OWN ADVENTURE trademarks have acquired substantial goodwill and secondary meaning.

44. In addition to the trademark registrations, Chooseco has actively engaged in and developed products and services using the trademark CHOOSE YOUR OWN ADVENTURE.

45. Netflix has adopted and is using CHOOSE YOUR OWN ADVENTURE in a manner that is likely to cause confusion, and is causing confusion, mistake, and deception among the general purchasing public as to the origin and affiliation of Netflix with Chooseco.

46. Netflix is likely to deceive the public into believing that the reference to a “Choose Your Own Adventure” book in the film *Black Mirror: Bandersnatch* originates from, is associated with, or is otherwise authorized by Chooseco, all to the damage and detriment of Chooseco’s reputation, goodwill, and profits.

47. Netflix has committed the acts described in this Complaint with the knowledge that its imitation is intended to be used to cause confusion, mistake, or deception.

48. Netflix has unlawfully and wrongly derived, and will continue to unlawfully and wrongfully derive, income and profits from these infringing acts, and Chooseco has sustained and will continue to sustain substantial injury, loss, and damage in an amount to be proved at trial.

49. Netflix’s use of one or more of Chooseco’s trademarks on or in connection with its products constitutes willful and deliberate infringement of Chooseco’s trademarks, without authorization or consent in violation if § 32 of the Lanham Act, 15 U.S.C. § 1114.

50. Netflix’s acts of willful infringement have caused and will continue to cause Chooseco irreparable harm and injury to its goodwill and reputation unless the Court enjoins such conduct. Chooseco may have no adequate remedy at law. Thus, Netflix should be restrained and enjoined pursuant to 15 U.S.C. § 1116.

51. Because of Netflix's activities, Chooseco has been damaged in an amount to be ascertained at trial.

Second Claim for Relief – Federal Trademark Dilution
(15 U.S.C. § 1125(c))

52. Chooseco restates and incorporates the allegations of Paragraphs 1 through 51 of this Complaint as if fully set forth herein.

53. Chooseco's trademarks are "famous marks" within the meaning of § 43(c) of the Lanham Act, 15 U.S.C. § 1125(c)(1) and have been famous marks prior to Netflix's conduct alleged herein.

54. Netflix's use of the trademark CHOOSE YOUR OWN ADVENTURE in the film *Black Mirror: Bandersnatch* dilutes the distinctive quality of Chooseco's trademarks and was done with the willful intent to trade upon Chooseco's reputation and to cause dilution of Chooseco's trademarks.

55. Association with Netflix's use of Chooseco's trademark harms the reputation of Chooseco's mark.

56. Netflix's continuing use of the trademark is being done with notice and full knowledge that such activities are not authorized or licensed by Chooseco.

57. Netflix's acts are a knowing and willful violation of Chooseco's rights under § 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

58. Netflix may have no adequate remedy at law, and if Netflix's activities are not enjoined, Chooseco will continue to suffer irreparable harm and injury to its goodwill and reputation. Netflix should be restrained and enjoined pursuant to 15 U.S.C. § 1116.

59. Because of Netflix's activities, Chooseco has been damaged in an amount to be ascertained at trial.

Third Claim for Relief – Unfair Competition and False Designation of Origin
(15 U.S.C. § 1125(a))

60. Chooseco restates and incorporates the allegations of Paragraphs 1 through 59 of this Complaint as if fully set forth herein.

61. Netflix is selling and offering for sale in commerce a product bearing an unauthorized trademark identical to Chooseco's trademarks.

62. By deliberately and willfully using Chooseco's trademarks, Netflix has consciously and deliberately sought to capitalize on the distinctive quality and fame of Chooseco's trademark and has intended to capitalize upon and profit by consumer confusion that it has created.

63. Netflix's unlawful, unauthorized, and unlicensed sale and offering for sale of a product containing Chooseco's trademark creates the express and implied representation that the product originates from, is associated with, or is otherwise authorized or endorsed by Chooseco, all to the damage and detriment of Chooseco's reputation, goodwill, and sales.

64. Netflix's conduct is deliberate and willful, is likely to cause confusion, will injure Chooseco's reputation unless enjoined, and constitutes a false designation in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

65. Netflix wrongfully and unlawfully derived, and will continue to derive, income, profits, and benefits from this act of false designation of origin and false representation. Chooseco has sustained and will continue to sustain substantial injury, loss, and damage.

66. Netflix's acts have caused and will continue to cause Chooseco irreparable harm and injury to its goodwill and reputation unless restrained by this Court. Chooseco may have no adequate remedy at law. Netflix should be restrained and enjoined pursuant to 15 U.S.C. § 1116.

67. Because of Netflix's activities, Chooseco has been damaged in an amount to be ascertained at trial.

Fourth Claim for Relief – Unfair Competition
(Vermont Common Law)

68. Chooseco restates and incorporates the allegations of Paragraphs 1 through 67 of this Complaint as if fully set forth herein.

69. Chooseco built up valuable goodwill in Chooseco's CHOOSE YOUR OWN ADVENTURE trademark.

70. Netflix's use of CHOOSE YOUR OWN ADVENTURE is likely to and does permit Netflix to pass off its goods and services as those of, affiliated with, or otherwise authorized by Chooseco, all to the detriment of Chooseco and unjust enrichment of Netflix.

71. Netflix, with full knowledge of the fame of Chooseco's trademark, intended to and did trade upon the goodwill associated with Chooseco's trademark and has misled and will continue to mislead the public into assuming a connection exists between Chooseco and Netflix, when no such connection exists.

72. Netflix's actions amount to deception and misappropriation of the exclusive property owned by Chooseco.

73. Netflix's unauthorized use of Chooseco's trademark has caused and will continue to cause Chooseco damage by tarnishing the desirable reputation and image associated with Chooseco and Chooseco's trademark.

74. Netflix has unlawfully derived income and profits from their activities and will continue to derive income and profits from their acts of unfair competition, and Chooseco has sustained and will continue to sustain substantial injury, loss, and damage.

75. The acts of Netflix, which permit and accomplish confusion, mislead and deceive the public as to the source of Netflix's goods and services, falsely suggest a connection with Chooseco, constitute an act of unfair competition in violation of Vermont law. These acts have caused and will continue to cause Chooseco irreparable harm unless enjoined by the Court. Chooseco has no adequate remedy at law. Netflix should be restrained and enjoined pursuant to Vermont law.

76. Because of Netflix's activities, Chooseco has been damaged in an amount to be ascertained at trial.

Prayer for Relief

Chooseco prays as follows:

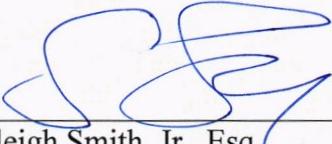
1. That the Court grant Chooseco an equitable accounting of Netflix's profits and award Chooseco its attorneys' fees and costs, plus its damages of at least \$25 million or Netflix's profits, whichever are greater, arising from Netflix's trademark infringement, false designation of origin, unfair competition, and trademark dilution, and such damages or profits are to be trebled pursuant to 15 U.S.C. § 1117 and otherwise by reason of the willfulness of Netflix's acts.
2. That the Court award Chooseco its costs of suit incurred;
3. That the Court grant Chooseco injunctive relief; and
4. That the Court grant such other relief as it deems just and proper.

Jury Demand

Plaintiff Chooseco LLC hereby demands trial by jury on all issues so triable.

DATED at Burlington, Vermont this 11th day of January, 2019.

By:



Shapleigh Smith, Jr., Esq.

Kendall Hoechst, Esq.

Dinse P.C.

209 Battery Street, P.O. Box 988

Burlington, VT 05402

802-864-5751

ssmith@dinse.com

khoechst@dinse.com

Counsel for Chooseco LLC